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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Sun Shipbuilding & Dry Dock Company hereby petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in this case on June 16, 1972.

I. OPINION BELOW.

The opinion of the Court of Claims, which has not yet been officially reported, is printed in the Appendix, pp. A1-A22.

II. JURISDICTION.

The judgment of the Court of Claims was entered on June 16, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. § 1255(1).

III. QUESTION PRESENTED.

Whether the action of the United States of America in delaying an initial decision on the contractor's estimate of increased costs resulting from changes for more than forty-five (45) months constitutes a breach of the government's obligation to approve or disapprove the contractor's estimate "as soon as practicable", thereby allowing the contractor to bring suit for those costs in the Court of Claims?

IV. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED.

No constitutional provisions, treaties, statutes, ordinances, or regulations are directly involved.

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V. STATEMENT OF THE CASE.

On October 6, 1971 Sun Shipbuilding & Dry Dock Company ("Sun") brought a contract action against the United States in the Court of Claims. Jurisdiction over that suit was conferred by 28 U. S. C. § 1491. Pursuant to the rules of the Court of Claims, Sun requested and was granted the right to notify a third party, Prudential-Grace Lines, Inc. ("Prudential-Grace") to appear and assert its interest in the proceedings. The United States responded to Sun's Petition by filing a Motion for Summary Judgment essentially alleging that Sun had failed to exhaust its administrative remedies, specifically those within the Maritime Administration. On its part, Prudential-Grace moved to vacate and quash service of the third party notice as procedurally improper while echoing the United States' position that Sun should be pursuing administrative rather than judicial relief. Briefs were filed by all three parties with supporting affidavits and exhibits, and the two motions were consolidated for decision. On June 16, 1972 the Court granted both motions and Sun's Petition was dismissed "without prejudice to the institution of a new action after the completion of the administrative proceedings." The question of whether Prudential-Grace was properly before the Court was not reached.

Sun's cause of action against the United States and Prudential-Grace arises from a ship construction contract entered into on June 14, 1963, by Sun as low bidding contractor, Grace Lines, Inc. ("Grace", corporate predecessor of Prudential-Grace) as purchaser-owner-operator, and a representative of the Secretary of Commerce as grantor of a construction differential subsidy pursuant to the applicable provisions of the Merchant Marine Act of 1936, 46 U. S. C. § 1151 et seq. Under that contract as amended Sun agreed to build six general cargo vessels for Grace to be constructed over a period of three and one-half years

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for a total price of $77.85 million. Grace and the Maritime Subsidy Board ("Board"), the division of the Maritime Administration which has the responsibility for administration of such contracts, agreed *inter alia* to pay certain percentages of that price (averaging 46.5% and 53.5% respectively). Further, Grace and the Board had the right to order Sun to perform work in addition to or in place of that called for in the plans and specifications, i.e., changes. In such instances, Sun was to submit "its detailed estimate of the net increase . . . in the cost of the contract work and probable delay in delivery of the Vessel to result from such change." The Board was obligated to approve or disapprove that estimate "as soon as practicable" and Sun was entitled to receive from Grace and the Board as part of the contract price 110% of the "net increase in estimated cost . . . resulting from all change cost estimates, as approved or as finally determined." (See the Appendix to the opinion below, reproduced *infra*, at A18-A21.)

During the course of Sun's performance, Grace and the Board directed Sun to perform numerous changes. However, several of these changes were of unusual magnitude, novelty, and impact on the orderly construction of the ships. For example, the primary change effected centralized control of the engine room (mechanization) with a concomitant reduction in crew accommodations, a concept which was at that time in its infancy in the maritime world. While undoubtedly a valuable change to Grace and the Board since it offered the prospect of millions of dollars of labor cost savings over the life of the ships, mechanization had a profoundly disruptive effect on Sun's construction program. Sun proceeded to perform all changed work with reasonable diligence under the circumstances, but the six vessels were actually delivered an average of 290 days after the original contract delivery dates.

In December 1967, three months after delivery of the last ship, Sun submitted in accordance with the above-noted

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contractual requirement: (1) its estimate of the direct costs of the mechanization change and (2) its estimate of the delay and disruption costs resulting from all contract changes and statement of delay in delivery resulting from those changes. On June 27, 1970 Sun submitted an amended computation of certain delay and disruption costs. These two estimates, taken together, demand compensation from the United States and Grace in the total amount of $17,899,313.00. To this date, approaching the fifth anniversary of the last ship's delivery, Sun has received only $13 million in progress payments against that amount.

For some sixteen months after Sun submitted its initial estimates, no official action was taken. In April 1969, the Chief, Division of Estimates, Office of Ship Construction, Maritime Administration, served on the parties a decision granting Sun certain extensions of time pursuant to the contract. The decision did not, however, deal with Sun's claim for increased costs. In December 1970 the Chief, Office of Ship Construction (roughly comparable to the Contracting Officer in most government contracts), reviewed and altered the Division of Estimates decision, but still no cost determination was forthcoming. Despite continuing informal attempts by Sun personnel to expedite the receipt of a cost decision at the lowest Maritime Administration level, no such decision was actually received until January 14, 1972 (three months after Sun finally brought suit in the Court of Claims and some forty-nine months following its original claims submission). However, that decision marks only the beginning of the administrative disputes procedure comprised of appeals to the Board, reference to a Hearing Examiner for recommended findings, consideration by the Board of exceptions to those findings, and review by the Secretary of Commerce. (See the Appendix to the opinion below, reproduced *infra*, at A21-A22.)

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VI. REASONS FOR GRANTING A WRIT OF CERTIORARI

At the core of the decision below is the Court of Claims' conclusion that four years is not unreasonably long for a contractor to wait for an initial decision by the Maritime Administration on its change cost claim before filing suit in court. In addition to being an astounding and highly questionable proposition on its face, that holding contradicts many prior decisions of the same court. In *New York Shipbuilding Corp. v. United States*, 385 F. 2d 427 (Ct. Cl. 1967), the Court of Claims retained jurisdiction in an extremely complicated shipbuilding case where the contractor waited for thirty-four months before filing suit. The Court stated that

> "a proper administrative decision should, and could, have been forthcoming considerably before [suit was filed], and . . . the contractor had a right to such a determination prior to that time. The defendant's delay was so long and so unjustified that the Government must be held to have breached its implied covenant to render a timely and appropriate decision." 385 F. 2d at 436.

In *Universal Ecsco Corp. v. United States*, 385 F. 2d 421 (Ct. Cl. 1967), the Court of Claims held that a similar period of delay was too long for a government contractor to wait. A delay of approximately eighteen months enabled a contractor to obtain judicial relief in *Oliver-Finnie Co. v. United States*, 279 F. 2d 498, 503 (Ct. Cl. 1960), and in *Universal Ecsco* the Court said that it had previously held that "nine months or more is a sufficient waiting period." 385 F. 2d at 425.

In addition to being contrary to the Court of Claims' own precedent, the decision below violates the spirit of this Court's decisions in the government contracts field. In

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Anthony Grace & Sons v. United States, 384 U. S. 424 (1966), this Court expressed concern for holding contractors to their bargain with the government and it was stated that compelling policy reasons must clearly appear before Courts will accept such suits as the instant one. 384 U. S. at 428-30. However, it was at the same time noted that a prime reason for judicial hesitancy to interject itself into this arena is the "belief that resort to administrative procedures is an expeditious way to settle disputes, conducive to speed and economy." 384 U. S. at 429. That hesitancy should fade, therefore, where as in the instant matter trust in administrative expedition and speed is patently misplaced. A four year agency delay without even a contracting officer's decision must certainly be one of the most compelling reasons for judicial intervention to appear before this or any other court.

More recently, in *S & E Contractors, Inc. v. United States*, 92 S. Ct. 1411 (1972), several members of this Court displayed a keen sensitivity to the predicament of contractors such as Sun. In a concurring opinion in which he was joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Powell, Mr. Justice Blackmum recognized that the implicit or, as here, explicit promise of adjudicatory promptness is a quid pro quo for the contractor's forfeiture of common law remedies:

> "3. By accepting the disputes clause in his contract, the contractor bears the interim financial burden and gives up the right of rescission and the right to sue for damages. What he receives in return is the Government's assurance of speedy settlement and of prompt payment, not payment delayed for months or, as here, for years.
>
> 4. To compel a contractor to go through the administrative process and to proceed and to perform with less

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than his usual arsenal of defenses against administrative arbitrariness or unfairness, and then to have that determination submitted to judicial review at the behest of still another agency of Government, subjects the contractor to untoward delay in payment and to a financial hazard that may well prove to be ruinous." 92 S. Ct. at 1422.

While the instant case does not involve the Government's right to appeal an adverse administrative decision, this Court's broad condemnation of government delay is equally applicable where the contracting agency itself is the source of that delay. The evil of delay is twofold. First, as recognized in *S & E Contractors*, the financial harm to the contractor resulting from prolonged inaction is severe. The changes clause in the standard Maritime Administration construction contract requires the contractor (i.e., refusal would be a breach and grounds for termination) to perform changes absent a prior agreement on price. No progress payments need be made until the cost of the change is finally adjudicated by the Board. Since, in the case of changes of real magnitude such as those involved here, it is impracticable for a contractor to submit his final estimate before the vessels are completed, he has already been subjected to a substantial delay in the reimbursement of expended funds by the time he submits his final estimate. In the instant case Sun incurred the costs necessary to perform the changes in question over a period of more than four years before it could even submit a realistic estimate that would only begin the agency's adjudication process. Moreover, under existing law interest on the ultimate award cannot be recovered against the government and may not run against the Owner (Grace) until after the Board's final decision. Thus, the four year delay at issue here has cost Sun at least $240,000 for every

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million dollars to which it is entitled. Decisional delay is clearly devastating for the contractor.

Secondly, the government benefits directly from the delay. In awarding contracts the United States and its various administrative agencies wield tremendous economic power, and are able to exact a correspondingly heavy price from those who choose, or are by circumstances compelled to deal with them. That price normally takes the form of a standard government-drafted contract in part requiring the contractor's submittal of all disputes to the government with only limited judicial scrutiny. Thus, the government is in the advantageous position of being both financially interested litigant and judge/jury. Postponing the day of reckoning is especially attractive for the government because of annual budgetary considerations and the frequent turnover of top agency personnel. Moreover, there is no penalty for delay other than the embarrassment of an occasional judicial scolding. The obvious potential for abuse, both subtle and flagrant, is ameliorated in many agencies by the imparting of varying degrees of independence to contract appeals boards. The Maritime Administration is, however, not such an agency. The Maritime Subsidy Board is composed of the Maritime Administrator, Deputy Maritime Administrator, and the Maritime Administration's General Counsel, i.e., the highest officials of the Maritime Administration. Initial decisions are rendered by the Maritime Administration staff. The Board's decision is subject to review by the Secretary of Commerce himself. Therefore, a party contracting with the Maritime Administration is openly exposed to the tactical use of delay in furtherance of the agency's monetary self-interest and as a weapon for coercing claim settlements. These factors seem to have had little impact, however, on the Court of Claims.

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Sun's principal contention on this Petition is a simple one: four years is too long for a contractor to wait under any circumstances for action by the Maritime Administration's contracting officer. It is important to note that such action is not comparable to that taken by a court after pleadings, discovery and a trial have finally put the case into a form whereby it can be adjudicated. What Sun was contractually owed but did not receive for those four years was action on the part of the Maritime Administration subordinate official who first renders a decision only on the basis of Sun's estimate and the thorough documentation of construction events available within the Maritime Administration. While Sun's claim is indeed complex, the Administration has a full staff of experts in this field. It is sufficient to say that if the Maritime Administration had wanted to adjudicate that claim, if it had felt any sense of urgency whatsoever about fulfilling its contractual duties, a reasoned and thoughtful initial decision would have been forthcoming within six months of Sun's claim submission. The lack of such decision for a full four years conclusively establishes the inadequacy and unavailability of Sun's remedies. The decision of the Court of Claims should therefore be reversed and the case remanded for trial.

In the alternative, this matter should be remanded to the Court of Claims for a preliminary hearing at which time the burden will be on the United States and Grace to establish clear and compelling justification for the four year delay. This allocation of the burden of proof is warranted for two reasons ignored by the court below: (1) the magnitude of the delay and the correspondingly great harm to Sun make out a prima facie case for the inadequacy and unavailability of the administrative remedy and (2) the fact that the government profits proportionately to the extent of the delay, over which it has complete control, makes any substantial delay inherently suspect. Contrastingly, the

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Court of Claims placed upon Sun the burden of proving ba faith on the part of the Maritime Administration—a burde literally impossible to meet by direct proof in the hands o a contractor. Moreover, the procedural context of th Court of Claims' ruling was the defendants' motions fo summary judgment supported only by affidavits and briefs In those papers Sun's opponents offered several explana tions for the delay, e.g., the Maritime Administration wa awaiting the outcome of a similar dispute also involvin Sun, such delays are not uncommon in the Maritime Ad ministration, and Sun's claim is quite complex and was a one time revised. The court below apparently disregarde Sun's counter arguments attacking the accuracy, impor tance and relevance of these explanations, and Sun had n opportunity to examine the persons making affidavits fo the government whose offers of delay justification wer accepted without question by the court. Why the govern ment delayed adjudication of Sun's claim is a subjectiv matter and is at the heart of the issue as viewed by th Court of Claims; Sun is at least entitled to a hearing o that issue where it can get at the truth more effectively than through a battle of affidavits.

The decision below represents a substantial retrea from the prudent exercise of judicial pressure on contract ing agencies to utilize the expert resources at their disposa to make truly expeditious awards. Action by this Cour appears necessary to set appropriate limits on the exten to which those agencies can abuse their dual position a arbiter and litigant and to force a more practical approach to the self-serving rationales for delay offered by the gov ernment when their inaction is finally called into question The decision of the Court of Claims does not evidence a meaningful and realistic approach to the problem of gov ernmental unfairness to contractors existing within th Maritime Administration and should be reversed.

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VII. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the judgment of the Court of Claims.

Respectfully submitted,

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JOHN J. RUNNER,
123 South Broad Street,
Philadelphia, Pa. 19109
Attorneys for Petitioner.

Of Counsel:
E. PARRY WARNER,
PEPPER, HAMILTON & SCHEETZ.

CERTIFICATE OF SERVICE

I, Peter Hearn, one of the attorneys for Sun Shipbuilding & Dry Dock Company, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 14th day of September, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Claims on the several parties thereto, as follows:

1. On the United States, by mailing three copies, in a duly addressed envelope with first class postage prepaid, to Edward J. Friedlander, Esquire, United States Assistant Attorney General, Civil Division, Department of Justice, Room 7268, Todd Building, Washington, D. C. 20210 and by mailing three copies, in a duly addressed envelope, with first class postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On Prudential-Grace Lines, Inc., by mailing three copies in a duly addressed envelope, with first class postage prepaid, to its attorney of record, Michael Joseph, Esquire, Tower Building, 1401 K Street, N. W., Washington, D. C. 20005.

PETER HEARN,
123 South Broad Street,
Philadelphia, Pennsylvania 19109
Attorney for Petitioner.

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Appendix.

IN THE UNITED STATES COURT OF CLAIMS

No. 756-71

(Decided June 16, 1972)

SUN SHIPBUILDING & DRY DOCK COMPANY

v.

THE UNITED STATES

John J. Runzer, attorney of record, for plaintiff. *E. Parry Warner* and *Pepper, Hamilton & Scheetz*, of counsel.

Edward J. Friedlander, with whom was *L. Patrick Gray, III, Assistant Attorney General*, for defendant.

Michael Joseph, attorney of record, for Third Party Prudential Grace Lines, Inc. *Kominers, Fort, Schlefer & Boyer, J. Alton Boyer*, and *Marcus B. Slater, Jr.*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, and KUNZIG, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE PETITION OR IN THE ALTERNATIVE FOR AN ORDER SUSPENDING PROCEEDINGS PENDING EXHAUSTION OF ADMINISTRATIVE PROCEEDINGS, AND ON THIRD-PARY DEFENDANT'S MOTION TO VACATE AND QUASH SERVICE OF THIRD-PARTY NOTICE.

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DAVIS, *Judge*, delivered the opinion of the court:

Under the tripartite scheme well known to the American maritime world, plaintiff Sun Shipbuilding & Dry Dock Company agreed to construct four general cargo ships for shipowner Grace Lines, Inc.(now Prudential Grace Lines, Inc.), with the United States as grantor of a construction-differential subsidy.[1] An amendment increased the number of vessels to six and the contract price to $77,850,000.[2] This case does not concern the determination of the amount of the subsidy but solely the shipbuilder's demand for an increased price under the "changes" mechanism in the contract. Sun's contention is that the Maritime Administration has dawdled too long in processing and deciding the claim, and that this court should take over the whole matter at once, as in *New York Shipbuilding Corp. v. United States*, 180 Ct. Cl. 446, 385 F. 2d 427 (1967).

During the course of performance, numerous changes were ordered by Grace and approved for subsidy by the Maritime Subsidy Board, the most important of which called for an increase in mechanization and a reduction in quarters for crew. Sun made these changes, and in December 1967, three months after delivery of the last vessel, submitted, pursuant to Article 4(d) of the contract,[3] estimates of the increase in costs and the delay in delivery-time

1. For descriptions of these tripartite subsidy arrangements, see *Sun Shipbuilding & Dry Dock Co. v. United States*, 183 Ct. Cl. 358, 393 F. 2d 807 (1968); *Moore-McCormack Lines, Inc. v. United States*, 188 Ct. Cl. 644, 413 F. 2d 568 (1969); *Lykes-Youngstown Corp. v. United States*, 190 Ct. Cl. 348, 420 F. 2d 735, *cert. denied*, 400 U. S. 865 (1970).

2. The percentage of payment was divided differently between the Maritime Subsidy Board and Grace in the original contract and the addendum, but in each instance Grace paid slightly less than half, 46% for the first four ships and 47.5% for the remaining two.

3. Article 4 is set forth in full in the Appendix, *infra*. See also note 6, *infra*.

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said to be necessitated by the alterations. This estimate included not only the cost of additional "hardware" but also the expense of delay. The statement likewise sought an extension of time in order to relieve Sun of liability for liquidated damages (alleging that the changes ordered by Grace had occasioned the late delivery).[4]

Sun's claims were referred to the Division of Estimates, a staff section of the Office of Ship Construction of the Maritime Administration. The Division of Estimates considered the request for an extension in delivery-time separately from the demand for an increase in price and, after receipt of comments by Grace, rendered a decision on April 7, 1969, only on the time-extension claim. On July 3, 1969, this time-extension determination by the Division of Estimates was challenged by Sun under Article 36 (the disputes clause),[5] and the issue was then formally referred under that provision to the Chief, Office of Ship Construction (COSC) for resolution.

The COSC announced his decision on December 21, 1970 and Sun appealed to the board on January 18, 1971. Pursuant to usual practice the matter was referred by the Board to a hearing examiner, as its arm, prior to final action by the tribunal itself. The examiner held a pre-hearing conference on March 30, 1971, and scheduled the hearing for early August. At the request of Grace, that

4. This latter request would come under Article 5, "Extension of Time."

5. Article 36 (which differs from the conventional form of disputes provision) reads in part: "Any action, omission, direction, decision or determination of the Board, the Owner, or the Contractor under this contract may be the subject of a dispute. Any dispute arising under this contract which is not disposed of by agreement of the parties to this contract, shall be decided by the Chief, Office of Ship Construction * * * which decision shall be final and conclusive and shall bind all parties to this contract unless within (30) days * * * the contractor or the Owner [Grace] appeals from said decision by mailing * * * a written appeal addressed to the Board."

The full text of Article 36 is set forth in the Appendix, *infra*.

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initial date was postponed to permit further time for discovery, and the hearing was rescheduled for December 8, 1971.

Sun filed suit in this court on October 6, 1971, asserting that the Maritime Administration had delayed too long and that the cost issues should all be settled here. The December hearing was stayed pending our determination whether to take the case on its merits.

The gravamen of the court suit is that, with a delay of four years (1967-71) in resolving the controversy, the Board has breached its contractual duty to act "as soon as practicable" (Article 4(e))[6] and that the remedy provided in the disputes clause (Article 36) has been shown to be inadequate and unavailable. Insisting that the same questions of fact and law upon which the United States' liability depends also control Grace's liability, Sun has served a third-party notice on the latter pursuant to our Rule 41(a). The Government naturally asserts that Sun should pursue its contractual remedy to exhaustion, and moves for summary judgment dismissing the petition on that ground, or, alternately, for suspension of proceedings in this court pending completion of the administrative process. Grace, the third-party, joins in that prayer but also seeks, in any event, to vacate and quash service of Sun's third-party notice. The case is now before us on those two motions.

I.

One of Sun's prime points is that this case parallels *New York Shipbuilding Corp. v. United States*, 180 Ct. Cl. 446, 385 F. 2d 427 (1967), in that (it is said) the entire

6. Article 4(e), Appendix, *infra*, reads in part: "The Owner [Grace] shall transmit such statement [cost estimate] to the Board which shall consider the Contractor's [Sun's] statement and on the basis thereof and on the basis of such other evidence as the Board may deem relevant shall, as soon as practicable, approve or disapprove the Contractor's estimate. The Owner shall promptly notify the Contractor of the Board's approval or disapproval of the Contractor's estimate."

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disputes mechanism was aborted because the Maritime Administration did not follow the contractually-designated procedure.

In *New York Shipbuilding*, arising out of the construction of the USS Savannah (the first nuclear-powered merchant ship), the court held that the parties had bargained for decisions of contractual disputes, not by the customary contracting officer, but by a specific official who would have the requisite detailed expertise to handle such conflicts—the Nuclear Projects Officer. When the final decision was not rendered by this individual but by another high official with broader responsibility and less extensive concern with nuclear vessels, we viewed the decision by the improper authority as a nullity, and stated: "We can act therefore as if, prior to bringing suit here, plaintiff received no determination at all of its claims under the contract." *Id*, at 461-62, 385 F. 2d at 436.

It was in those circumstances of the utter lack of a proper initial determination that we concluded: "[T]he defendant's delay was so long and so unjustified that the Government must be held to have breached its implied contract to render a timely and appropriate decision." (*Id.* at 462, 385 F. 2d at 436). In *New York Shipbuilding*, as in this case and in the usual disputes clause controversy, there was a two-step administrative procedure once the formal disputes process had been invoked—first a determination by the contracting officer (or a substitute) and then an appeal to a contract appeals board. We emphasized in the earlier case that there had been no lawful preliminary decision, no necessary first step: "No proper initial decision has been rendered administratively, there is nothing from which to appeal, and there is nothing for the appeal board to consider."

The reason plaintiff gives for pushing this case into the *New York Shipbuilding* mold is that the Maritime Administration failed to comply with the requirement of Article

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4(e), note 6, *supra*, that "the *Board* * * * shall consider the Contractor's [Sun's] statement [of estimated costs for the changes] and on the basis thereof and on the basis of such other evidence as the *Board* may deem relevant shall, as *soon as practicable*, approve or disapprove the Contractor's estimate (emphasis added). The argument is that this portion of the agreement compelled the Maritime Subsidy Board itself—not the Division of Estimates, or the Chief, Office of Ship Construction (COSC)—to make the first approval or disapproval of the shipbuilder's cost estimate. We are cited to the Board's Administrative Order 12,[7] to the effect that the Board has delegated authority to the COSC to approve changes in cost, as well as delay in delivery, only where the amount is not in excess of $50,000, a far smaller claim than is involved here.

But plaintiff, as we see it, misinterprets the structure of this special disputes' mechanism, especially in the light of the maritime agency's consistent understanding of that design. Article 4(d), Appendix, *infra*, calls upon the shipbuilder, once an owner's change has been authorized, to furnish a cost estimate (a "detailed estimate of the net increase or decrease in the cost of the contract work"), as well as an estimate of probable delay. Under the first sentence of Article 4(e), the Government is to decide whether to approve or disapprove this estimate. This is a first stage, coming before the invocation of the disputes procedure, and comparable to the ordinary effort by a contractor to obtain the contracting officer's consent to a specified equitable adjustment. No contractual dispute arises in the technical sense unless and until the Government (or the owner) does formally and finally disapprove and disagree.

In other words, Article 4(e) contemplates either of two possibilities as occurring after the shipbuilder submits its

7. Administrative Order 12, Pike & Fischer, *Shipping Regulation* 110: 168-176, § 2.02(1) and (2).

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estimate: first, all parties may agree (the Board manifesting its agreement by approval), resulting in adjustment of the contract price to reflect 110% of the Contractor's estimated cost as approved by the Board; or, second, the owner (Grace) and the Government may disagree with the estimate, leading to a formal dispute to be settled through the procedure of Article 36, Appendix, *infra*.[8] In the latter event, the first-level decision (akin to the final decision by the contracting officer in the standard disputes situation) is by the COSC. If the contractor (or the owner) is dissatisfied with that finding, it may then appeal to the board itself.

Under this system we see no reason why the Board may not remit to the Division of Estimates the preliminary scanning of the shipbuilder's estimate. If the Division had agreed with that proposal, then the Board would itself have to give approval, perhaps through some informal procedure,[9] since Order No. 12, *supra*, delegates final power *to approve* only if the amount is no more than $50,000. But where the Division disagrees, the ensuing procedure differs; in that event the Board's determination is to be obtained through the steps of the formal disputes mechanism.

Nothing prohibits the adoption of such a course. The contract, reasonably read, permits it. Order No. 12 does not deal with a tentative *disapproval* (by a lower level of the agency) of a large change, or forbid consideration of such an estimate by staff (including the Office of Ship Construction and its components); only definitive approval at

8. Article 36, Appendix, *infra*, provides (in part): "* * * Any dispute arising under this contract which is not disposed of by agreement of the parties to this contract, shall be decided by the Chief, Office of Ship Construction * * * which decision shall be final and conclusive and shall bind all parties to this contract unless within thirty (30) days * * * the Contractor or the Owner appeals from said decision by * * * a written appeal addressed to the Board * * *"

9. This assumes that the owner also agrees to the estimate.

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the lower level is excluded by the order. Nor are we pointed to anything else barring delegation by the Board of the initial review of the shipbuilder's estimate. Accordingly, it is a permissible reading of the first sentence of Article 4(e) to say that the Board itself need not pass upon the estimate before the disputes mechanism can be triggered (an event which occurs, of course, only if the Government (or the owner) disagrees), but that the Division of Estimates can make the first survey.

Indeed, it would be most awkward to interpret Article 4(e) as compelling a negative determination by the Board itself before a dispute can arise. For if the Board disapproved the estimate at that first stage, the contractor would have the right to invoke the disputes procedure of Article 36, leading to an initial formal decision by the COSC, a subordinate of the Board which had just indicated disapproval, and then to an appeal to the very Board which had already given an unfavorable response. In view of those consequences of plaintiff's reading, the Government cannot be chided for giving, as it has, the other construction to Article 4(e).

Plaintiff was obviously aware of this agency procedure and in fact followed it. After the Division of Estimates acted less favorably than Sun desired, the latter placed the matter formally in dispute (on July 3, 1969) under Article 36 and awaited the formal determination of the COSC.[10] There was no protest at that time that the Board itself should have acted before the matter could be placed in dispute. Then, after the COSC decided, Sun took its appeal to the Board, again without such a protest. Until litigation was begun in this court, there is no record (of which we are

10. The regulations list as duties of the COSC that his office "[a]pprove or recommend approval of changes above $10,000" and "[u]nder the Disputes article in Ship Construction Contracts decide disputes arising out of such contracts." Pike & Fischer, *Shipping Regulations* 110: 168-176, § 3.01(4) and (5).

aware) that Sun contended that the agency was acting invalidly in failing to have the Board itself pass at the outset on the cost estimate. Moreover, the procedure of initial formal decision by the COSC followed by an appeal to the Board appears to have been utilized in at least five previous cases in which Sun was the aggrieved contractor.[11]

The result is that this case is not at all like *New York Shipbuilding* in which the fatal defect was the absence of any proper initial determination from which an appeal could be taken. Here, in contrast, there was a first partial determination by the proper official, and an appeal to the appeals board was taken. The COSC's decision on the dispute possessed the same degree of initial finality under the Grace-Sun-Maritime contract as the Nuclear Project Officer's decision (had it been forthcoming) under the *New York Shipbuilding* contract. Both officials stood in the shoes of the contracting officer who customarily decides disputes, in the first instance, under Government contracts. The difference is that in *New York Shipbuilding* the designated Nuclear Project Officer had never acted while in the present instance the COSC acted on part of the claim well before this suit was brought, and was properly seized of the other aspects.[12] The departure from the required procedure which Sun asserts did not actually exist.

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11. Reported at 7 SRR 944 (1966); 7 SRR 997 (1967); 7 SRR 1100 (1967); 9 SRR 503 (1967); 9 SRR 799 (1967).

12. The COSC did not act, before the petition was filed, on the cost phase of Sun's claim, but the record is clear that he had it before him and intended to act upon it in what he deemed due course. See Part II, *infra*. He never disavowed either his power to act on that facet of the claim or his intention to do so, and there was no reason to believe that he had any other position. If Sun thought that he had decided never to act upon the cost aspect, it could have made that "decision" the subject of a formal dispute under the first sentence of Article 36, the disputes clause: "Any action, *omission*, direction, decision or determination of the Board, the Owner or the Contractor under this contract may be the subject of a dispute" (emphasis added).

II.

Plaintiff's other major contention is that, even if the proper officials were involved at all levels, still the Maritime Administration dallied too long in considering the claim—so long that under the rule of *Universal Ecsco Corp. v. United States*, 181 Ct. Cl. 10, 16-19, 385 F. 2d 421, 424-25 (1967), and similar decisions, the Government "must be held to have breached its covenant to render a timely decision, with the consequence that plaintiff became immediately entitled to a court adjudication." *Clement Bros. Co. v. United States*, 190 Ct. Cl. 50, 53, 418 F. 2d 1356, 1358 (1969).

There is, of course, no rule of thumb for appraising delays in the contractual-administrative process. Like all tribunals, the procuring agency has considerable discretion and leeway in controlling its procedure, and must have due time to decide fairly. On the other hand, it cannot abuse its discretion by dragging its feet so leadenly that the delay becomes intolerable. The overall standard for evaluating the propriety of a delay looks to the particular case and the particular situation: the agency "cannot wait indefinitely before making a decision, but must act within a reasonable time under the existing facts and circumstances." *Universal Ecsco Corp. v. United States*, *supra*, 181 Ct. Cl. at 18, 385 F. 2d at 425.

A. In this instance it is clear that a long time did elapse, begun by the decision of the Division of Estimates to consider Sun's request for a time-extension separately from the claim for a price-increase (although both were presented simultaneously). Because of that choice, the Division of Estimates gave its position on the time-extension in April 1969—and only on that one issue at that time. After that limited question was put into dispute the COSC decided it in December 1970, and appeal to the Board was taken in January 1971.

The Government explains deferral of the cost claim as a deliberate election to await the outcome of another proceeding then before the Maritime Administration, *Sun Shipbuilding & Dry Dock Co. v. United States Lines*, in which the controversy arose out of another tripartite contract—between United States Lines, Sun, and the Board—involving the same question of costs and delay in installing mechanization equipment and revamping the crew's quarters pursuant to change orders, and embodying the identical disputes clause. The Sun-United States Lines case was decided by the Board on August 25, 1971.[13] The Division of Estimates was then directed to proceed forthwith on its evaluation of Sun's cost estimates in the current Sun-Grace case, in the light of the Board's *United States Lines* ruling. The COSC handed down his determination of costs in January 1972, after suit was commenced here (on October 6, 1971).

To evaluate Sun's position that the postponement of consideration of the cost claim until the Board acted in *United States Lines* was unreasonable, we must look to the relationship of the United States Lines-Sun case to the present Grace-Sun claim. Early in 1967, the Division of Estimates acted upon Sun's claim in *United States Lines*. Since a lesser amount was allowed than had been hoped, Sun placed the matter in dispute, thereby triggering a formal decision by the COSC which came late in 1969. Unhappy with his determination, the parties in *United States Lines* appealed to the Board. Meanwhile, as of June 1, 1970, the COSC communicated to Sun his then-prevailing intention to decide both the cost and time-extension claims together in the Grace-Sun case.

In the following weeks, two events occurred which seem to have changed his mind. First, in June 1970, the Board's

13. The Board's hearing examiner had given his recommended decision on June 6, 1970, and oral argument was heard on March 17, 1971.

hearing examiner in *United States Lines* recommended (see note 13, *supra*) a significant increase in that award to Sun. His was the first reported decision within the agency (1) approving the "daily rate" method of computing the cost of unabsorbed overhead; and (2) dealing with the issue of whether delay-associated costs were recoverable under the Board's standard-form construction contract or whether the "Rice Doctrine" (named after *United States v. Rice*, 317 U. S. 61 (1942)) was applicable. The second and related development was the significant upward revision of Sun's estimate in this Grace-Sun proceeding from $12,996,259 to $17,899,313, submitted to the Board on July 27, 1970. Sun's letter setting forth this $5,000,000 increase explained that "recent recommendations by the Hearing Examiner in the delays of five *U. S. Lines* ships * * * have introduced certain methods of assessment of delay costs previously unconsidered."

It appears, then, that in large measure Sun occasioned the postponement of the evaluation of its cost estimate in the Grace-Sun proceeding until the Board's decision in the United States Lines-Sun contract claim, or, at least, that it acquiesced in such a delay. From the outset, Sun's tripartite contracts with United States Lines and with Grace were similar; in addition, comparable mechanization changes and the ensuing questions of cost and delay were raised in each case. From the time of Sun's upward revision of its cost estimates on the present contract in July 1970, the resemblance became even more striking, since Sun itself introduced into this proceeding the new method of estimating delay costs approved by the examiner in *United States Lines*, and soon to be reviewed by the Board.

Had the extensive increase in the estimate been unconnected with the *United States Lines* litigation, delay in processing would still be the likely result of such a major new submission, but deferral became almost inevitable in

view of the admitted origin of the new estimate in the recommended decision of the hearing examiner in *United States Lines*. At the least, it was certainly reasonable, in those circumstances, for the agency to wait for the Board's action in *United States Lines*—even though it might also have been a reasonable course to choose to go ahead simultaneously in this Grace-Sun proceeding. Tribunals often defer action until another controversy raising the same questions has been resolved, either by the tribunal itself or by another.

Sun attacks the sincerity of the Government's explanation for the delay (that Maritime was waiting for the Board's *United States Lines* ruling) on the ground that when the COSC finally issued his decision on costs in January 1972 he did not (according to plaintiff) pay much attention to the Board's *United States Lines* determination. We do not scan the January 1972 decision to see the extent to which it may have followed or deviated from the Board's earlier ruling—that is surely not a question now before us at the current stage of this case. Suffice it that nothing on the face of the COSC's decision shows bad faith or any reason to reject the suggestion in that opinion that the COSC postponed his determination until the Board had acted in *United States Lines*. Nor is there any extrinsic proof of bad faith.

The reasonableness and good faith of the postponement must be evaluated as of the time it was undertaken. At that moment the COSC could not have foreseen exactly what the Board would conclude, and if the Board's opinion turned out to be less helpful than he had hoped he would not be the first official or tribunal to defer action until another body has ruled, only to find that the subsequent determination did not shed as much light as was anticipated. There is, in short, an utter failure to show bad faith on the part of the COSC at the time he chose to put off his decision.

Sun also complains that it received no notice of
COSC's abandonment in the latter part of 1970 of
earlier plan to decide the cost and time-extension cla
concurrently. The Government insists that plaintiff
sent a copy of the December 1, 1970 letter communicat
the postponement, but in any event the point is
academic. Three weeks later, the COSC issued his decis
on the time-extension aspect alone, thus giving unequivo
notice of his election to proceed separately on that questi

B. The other facet of the delay which Sun challenges
curred after the appeal to the Board on the time-extens
claim. This was taken on January 18, 1971, and
referred to the examiner on February 25, 1971. The he
ing was scheduled for August 3, 1971, but was postpo
twice to December 6, 1971 at Grace's request, to enable it
conclude discovery and to complete its trial preparati
As already noted, this litigation was begun on October
1971, in part (according to Sun) because of the last po
ponement to December 6th.[14]

Plaintiff is right that the Government may not h
behind the size of a contractor's claim to escape its obli
tion to render a timely decision, but the amount of a cla
does enter into a determination of what is undue time
discovery or excessive delay by the agency. In other ca
involving Sun before the Board, five or six years elap
between delivery of the last ship and final decision by
Board (most notably in the *United States Lines* p
ceeding).

14. Sun's brief puts it that Sun had no real assurance that
extension would be the last, that "no meaningful action was fo
coming from the Department of Commerce and MarAd [Mari
Administration] in response to Sun's numerous complaints and
quests for action over the last several years including the recent in
tives of [two of Sun's high management personnel]" and "four y
had passed without a Maritime Subsidy Board action on its det
estimate."

On what has been presented to us we are unable to conclude that the postponements after the case reached the appeal stage were so unwarranted as to amount to a breach of the Government's duty to decide. Grace did not have any discovery before the end of February 1971: Sun first permitted the owner access to its files on February 22nd. Faced with a voluminous discovery (about 85 file drawers, we are told), Grace made two requests for postponement, the first until early October and then until December 6, 1971. We cannot say that, in a case of this size and directly involving the matter of Sun's costs, these extensions were undue, especially in view of the late date of access by Grace to plaintiff's files. The rules of the Maritime Administration may not compel earlier discovery, but Sun's failure to permit it voluntarily is another indication that the challenged delay was not entirely caused by factors beyond its own control.

Moreover, in evaluating the propriety of the delay, we cannot forget that Grace (in addition to the Government) is entitled to exhaustion of the administrative disputes procedure. Under Articles 4 and 36, Appendix, *infra*, the owner (Grace) has a contractual right to appeal controversies to the Board. Where this court has permitted contractors to bypass agency proceedings and obtain immediate judicial relief, it has acted on the theory that the Government's breach of its own obligation to render a timely decision by the proper official forfeits the Government's correlative right to insist on a disputes clause decision.[15] It is sig-

15. "The parties originally contemplated an administrative hearing but the defendant, not the contractor, has circumvented that provision of the contract by breaching the agreement to render a proper and timely initial determination. By this rupture of the contract defendant has lost the right to insist upon administrative findings and an administrative decision." *New York Shipbuilding, supra,* 180 Ct. Cl. 464, 385 F. 2d at 438. Accord: *Zidell Explorations, Inc. v. United States,* 192 Ct. Cl. 331, 338, 427 F. 2d 735, 739 (1970).

nificant that at no point does Sun suggest that Grace has breached its duties in connection with the disputes proceedings and thus lost its right to an administrative determination. Grace's interest must therefore be considered along with plaintiff's and defendant's.

c. The upshot is that, in our judgment, Sun has failed to show that the Government has thus far breached its obligation to render a timely decision. The agency has not acted unlawfully or abused its discretion. *Cf. Clement Bros. Co. v. United States*, 190 Ct. Cl. 50, 418 F. 2d 1356 (1969); *Zidell Explorations, Inc. v. United States*, 192 Ct. Cl. 331, 338, 427 F. 2d 735, 739 (1970).[16]

The direct consequence is that plaintiff cannot use the tool of *New York Shipbuilding Corp. v. United States, supra*, 180 Ct. Cl. 446, 385 F. 2d 427 (1967) and *Universal Ecsco Corp. v. United States, supra*, 181 Ct. Cl. 10, 16-19, 385 F. 2d 421, 424-26 (1967), to substitute a judicial trial of its claim for a miscarried administrative determination. The corollary is that this action is premature and must be dismissed (without prejudice) to await the ending of the administrative process. *Zidell Explorations, Inc. v. United*

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16. The petition also alleges that "the Board and the administrative staff view the Article 4(e) and Article 36 dispute procedures as a continuation of claim negotiations rather than the pursuit of a fair and impartial adjudication of the equities among the Contractor, Owner and Government" and "the above described attitude of the Board and its staff combined with their dual role as party litigant and arbitrator make it impossible for Sun to receive a fair hearing under the administrative practice and deprives it of due process." The defendant's motion for summary judgment does not admit such broad and conclusory generalities and plaintiff has not documented them with detailed and adequate affidavits or other material (as it should have if it wished to rely upon the allegations). No triable issue has therefore been raised as to these unspecific assertions and we disregard them as wholly unsupported on the present record which lends them no credence.

States, supra, 192 Ct. Cl. at 334, 338-39, 427 F. 2d at 737, 739 (1970).[17]

We trust and anticipate that in this old and much-prolonged (though complex) case the Maritime Administration will conclude its proceedings as speedily as feasible. Everyone's interests will be advanced by prompt consideration.

III.

Grace, the third-party, moves to vacate and quash service on it (at Sun's behest) of the third-party notice. The first ground put forth for this application is the same as the defendant's request for summary judgment—that Sun has failed to exhaust its administrative remedy. Alternatively, Grace insists that there is no warrant in the legislation governing third-party practice in this court, or in our rules, for Sun's attempt to bring Grace into the litigation, even if the court is to entertain the action.

Because we dismiss the petition on the ground that Sun has not yet pursued the administrative road to the end, we need not, and do not, pass at this time upon the alternative aspect of Grace's motion. The service upon Grace necessarily falls with the dismissal of the petition as premature and the termination of the entire case. The motion will be granted on that ground. The other question raised by the Grace application becomes moot and is therefore left undecided.

The defendant's motion for summary judgment and the third-party defendant's motion to vacate and quash service

17. Under the rule of *Zidell Explorations,* we dismiss the petition entirely, instead of merely suspending proceedings here, because the substantive claim asserted by the petition is plainly "under the contract" and there is no truly separate "breach" claim. Contrast *Clements Bros. Co. v. United States,* 190 Ct. Cl. 50, 55-56, 418 F. 2d 1356, 1359 (1969). Insofar as the petition claims a past breach of the defendant's duty to render a timely decision by the proper official or tribunal, our decision today rejects that claim.

of the third-party notice are granted for the reasons stated. The petition is dismissed without prejudice to the institution of a new action after the completion of the administrative proceeding.

APPENDIX.

Article 4. CHANGES IN PLANS AND SPECIFICATIONS AND ADJUSTMENTS OF CONTRACT PRICE FOR CHANGES INCREASING OR DECREASING CONTRACT WORK. (a) The Contractor shall not depart from the requirements of the Plans and Specifications without prior written authorization by the Owner approved by the Board. In making application to the Owner for approval of a change in the Plans and Specifications, the Contractor shall set forth clearly the reasons for and the advantages of such change and shall submit its preliminary estimate of the change in cost, weight, moments and centers and delay in delivery of the Vessel, which estimate shall be accompanied by a full description of the completed work which would be eliminated or would have to be modified, of the acquired material which would not be used if the change is approved and of the effect, if any, of the proposed change upon any guarantee of the Contractor under this contract. The Owner shall consider the Contractor's request with all expedition and dispatch and shall present promptly all relevant data to the Board for approval, together with the Owner's recommended approval or disapproval of the Contractor's request. The Owner shall advise the Contractor in writing of its decision on the Contractor's request, as approved by the Board.

(b) The Owner, with the approval or authorization of the Board, may direct any change in the Plans and Specifications effecting a deduction from or an addition to the contract work set out therein within the general scope

thereof; provided, however, if a directed change in the Plans and Specifications affects a specific guarantee set out in the Specifications or in the Special Provisions and such effect is noted by the Contractor in its estimate of the change the guarantee will be modified to the extent determined by the Board. The Contractor shall proceed promptly with all changes authorized or directed by the Owner, and approved or authorized by the Board, as provided in this Article 4; provided, however, if the Board determines that the performance of the increased work incident to a major change will subject the Contractor to damages from the consequent delay of other work of the Contractor then under contract, the Contractor shall not be required to proceed with such additional work unless the Owner agrees to pay to the Contractor such damage costs as determined and approved by the Board.

(c) In connection with the consideration of a proposed change in the Plans and Specifications initiated by the Owner, the Owner may request (if the proposed change makes a major change in the Plans and Specifications such request shall be approved by the Board) the Contractor to submit to the Owner the Contractor's preliminary estimate of the change in cost, weight, moments and centers and delay in delivery of the Vessel which estimate shall be accompanied by a full description of the completed work which would be eliminated or would have to be modified, or acquired material which would not be used if the change is approved and of the effect, if any, of the proposed change on any guarantee of the Contractor under this contract and, if the change is a major change, the damage cost referred to in 4(b) above. Said preliminary estimate shall be submitted to the Owner within the time determined by the Board to be reasonably required for the preparation of such estimate. The Owner and the Board shall consider

such preliminary estimate. Within a reasonable time the Contractor shall be directed to proceed by the Owner, as approved by the Board, or shall be advised by the Owner that the proposed change will not be directed. In the event the proposed change is not directed, and the Board determines that the change proposed was a major change in the contract work, the Contractor shall be reimbursed for the engineering and estimating costs involved, as determined by the Board.

(d) Promptly and within a reasonable time, as determined by the Board, after receipt of directions from the Owner, as approved or authorized by the Board, to make a change in the Plans and Specifications, or authorization by the Owner as approved or authorized by the Board of a change in the Plans and Specifications, requested by the Contractor, the Contractor shall furnish to the Owner, in writing, a statement of its detailed estimate of the net increase or decrease in the cost of the contract work and probable delay in delivery of the Vessel to result from such change.

(e) The Owner shall transmit such statement to the Board which shall consider the Contractor's statement and on the basis thereof and on the basis of such other evidence as the Board may deem relevant shall, as soon as practicable, approve or disapprove the Contractor's estimate. The Owner shall promptly notify the Contractor of the Board's approval or disapproval of the Contractor's estimate. Notwithstanding a dispute in connection with the Contractor's estimate of the cost of a change, the Contractor shall, nevertheless, proceed promptly with the work covered by such directed or approved change. One hundred and ten per cent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or as finally determined, shall be added to the

contract price as an adjustment thereof. In the event of a net decrease in contract cost in the total of all such cost estimates the Contract Price shall be reduced by the amount of such net decrease.

(f) In the event the Specifications provide a contract price dollar allowance for specified material or equipment to be purchased by the Contractor upon direction of the Owner, with the approval of the Board, such purchases shall be made in conformity with the provisions of General Order No. 37 of the Federal Maritime Board. The Contract Price will be adjusted in accordance with the provisions of this Article 4 to the extent that the total of such purchases is greater or less than the allowance provided for in the Specifications.

Article 36. DISPUTES.—Any action, omission, direction, decision or determination of the Board, the Owner or the Contractor under this contract may be the subject of a dispute. Any dispute arising under this contract which is not disposed of by agreement of the parties to this contract, shall be decided by the Chief, Office of Ship Construction, of the Maritime Administration or by his duly authorized representative, who as the case may be, shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor and to the Owner, which decision shall be final and conclusive and shall bind all parties to this contract unless within thirty (30) days from the date of receipt of such copy the Contractor or the Owner appeals from said decision by mailing or otherwise furnishing said Chief, Office of Ship Construction, or his duly authorized representative, as the case may be a written appeal addressed to the Board. The decision of the Board on any question of fact, unless determined by a court of competent jurisdiction to have been fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad

faith or is not supported by substantial evidence, shall be final and conclusive and shall bind all the parties to this contract. In connection with any appeal proceeding under this Article 36, the Contractor and the Owner shall be afforded an opportunity to be heard before the Board or before the duly authorized representative or representatives of the Board appointed for the hearing of said appeal and an opportunity to offer evidence in support of or in opposition to the appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract work and in accordance with the decision of said Chief, Office of Ship Construction, or by his duly authorized representative, as the case may be. The fact that the Owner, with or without comment, refers to the Board as hereinbefore provided, the Contractor's estimates as to the cost and time of making changes, shall not prejudice the rights of any party to have any dispute relating thereto decided under this Article 36.